Supreme Court, U.S.
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NO. 96-891

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ALBERT W. JORDAN,

Petitioner,

vs.

KENTON COUNTY BOARD OF EDUCATION

AND

KENTUCKY TEACHERS' RETIREMENT SYSTEM,

Respondents.

On Petition for Writ of Certiorari to the
Sixth Circuit Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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15 pp

LIST OF INTERESTED PARTIES

The petitioner is Albert A. Jordan.

The respondents are Kenton County Board of Education and Kentucky Teachers' Retirement System. Donald J. Ruberg of O'Hara, Ruberg, Taylor, Sloan & Sergent is counsel of record for all respondents. Suzanne Cassidy is co-counsel for respondent Kenton County Board of Education. James M. Baker is co-counsel for respondent Kentucky Teachers' Retirement Systems.

Each of the respondents joins in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari filed by Albert Jordan, seeking review of an opinion of the U.S. Court of Appeals for the Sixth Circuit. The Court of Appeals' unreported decision upheld the Motion to Dismiss granted respondent Kentucky Teachers' Retirement System (KTRS) and the Summary Judgement granted respondent Kenton County Board of Education (Board) by the United States District Court for the Eastern District of Kentucky.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to hear this case is granted under 28 USC § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

STATEMENT OF THE CASE

Petitioner Albert Jordan is a former, non-tenured teacher with the Kenton County (Kentucky) Board of Education. As such, Petitioner was also a participant in the Kentucky Teachers' Retirement System (KTRS). In the middle of his fourth year as a teacher with the Board, Petitioner resigned his teaching position to join the United States Navy. However, shortly after enlisting, Petitioner sustained a serious injury while in training with the Navy and was granted a medically related discharge. Petitioner reapplied for his former teaching position in June, 1982, and was reinstated as a non-tenured teacher at the beginning of the 1982-83 academic school year.

During the course of that school year, school administrators determined that Petitioner was not satisfactorily meeting the requirements of his teaching position. Consequently, the Board did not offer Petitioner a teaching contract for the 1983-84 school year. Petitioner remained as a teacher for the full academic year of 1982-83. Petitioner claims that the Board's failure to offer him a subsequent teaching contract violated his rights under 38 USC § 4301, et seq., the Veterans' Reemployment Rights Act.

The essential facts underlying Petitioner's claims against KTRS are based upon his attempt to file for disability benefits. Petitioner complains of being illegally denied a disability pension. The KTRS denied Petitioner's request for a disability pension due to his failure to meet statutory requirements for eligibility. Under then existing eligibility statutes, Petitioner needed to have completed five full years of service in order to qualify for a disability pension. Petitioner qualified as a five year member of the plan in June, 1983. However, as the statute also provided, the disability of the applicant giving rise to a disability claim had to occur during the most recent period of employment in a position covered by the KTRS plan and subsequent to the completion of five years of teaching service. Petitioner's disability occurred during his active-duty military service in the Navy, in June, 1982, before the completion of five years of teaching service. Finally, KTRS determined that Petitioner failed to file his application for disability benefits within the one year time period required by the statute. Petitioner did not attempt to apply for disability benefits until 1988, four years after his eligibility to file for those benefits expired.

As far as can be determined from the questions presented for review by Petitioner, there is no compelling reason why this Court should grant the petition for writ of certiorari. The decisions rendered below do not conflict with decisions of other courts of appeal, nor has either lower court departed from usual and accepted courses of proceedings in deciding Petitioner's claims. The

questions presented by Petitioner are neither unique nor in conflict with applicable prior rulings of this Court or other federal law.

Based upon the foregoing facts, KTRS correctly denied Petitioner's application for a disability pension.

A. PROCEEDINGS AND DISPOSITION OF CASE BELOW

Petitioner Jordan filed suit against Respondents Kenton County Board of Education and the Kentucky Teachers' Retirement System in November, 1994, in the U.S. District Court for the Eastern District of Kentucky. Petitioner amended his complaint in May, 1995, attacking, among other things, all of Respondents' decisions as described above. Both Respondents filed motions to dismiss Petitioner's complaint. On October 11, 1995, the district court granted both motions, after correctly converting the Board's motion to one for summary judgment since it included material outside the pleadings. Petitioner moved the court to reconsider its decision, but the district court denied this motion on November 22, 1995.

Petitioner timely filed his notice of appeal to the Sixth Circuit Court of appeals on November 27, 1995. After all parties briefed the issues raised in Petitioner's appeal, the Sixth Circuit, on September 6, 1996, affirmed the order of the district court, sustaining the dismissal of all of Petitioner's claims. Petitioner filed a petition for an en banc rehearing, which the Sixth Circuit denied on October 23, 1996.

Petitioner timely filed his petition for a writ of certiorari with this Court on December 4, 1996.

B. CORRECTION OF MISSTATEMENTS IN PETITION

Under the guise of his Statement of the Case, Petitioner Jordan attempts to argue many of the issues raised in his petition, lodging unsupported charges of wrongdoing against various employees and agents of Respondents. However, since none of these statements are relevant to this Court's consideration of the petition for certiorari, Respondents will not refute them in this response. The legal deficiencies of the petition are addressed below.

REASONS FOR DENYING THE WRIT

A. PETITIONER'S FAILURE TO RAISE CERTAIN ISSUES BELOW DEPRIVES THIS COURT OF JURISDICTION TO HERE THOSE CLAIMS.

Consistent with this Court's "normal practice", Petitioner Jordan's failure to raise in the court of appeals certain issues contained in his petition for a writ of certiorari precludes this Court from addressing those issues. E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986). Therefore, these issues are not properly preserved for review by this Court.

The specific issues which Petitioner raises for certiorari review which were not ruled upon by the Sixth Circuit Court of Appeals, and thus are deemed waived, include:

a. While Petitioner raised certain allegations regarding the Board's recordkeeping practices in the Court of Appeals, he did not tie this alleged failure to a claim that his handicap was not accommodated.

b. For the first time, Petitioner asserts that the Board should have given him a pre-employment

physical to ascertain the existence of his handicap, or, alternatively, should have taken into account his facial disfigurements in automatically recognizing his need for accommodation.

c. Petitioner did not argue below that he had a right to be reemployed as a disabled veteran.

d. Petitioner did not raise any issues relative to the existence or the extent of any harassment directed toward him during his period of reemployment with the Board.

e. Petitioner raised no question below relative to the propriety of the Board's denial of his teacher tenure status.

f. Petitioner did not question the Board's reliance on the report of the U.S. Civil Rights Office in seeking and obtaining dismissal of Petitioner's claims against it in the Sixth Circuit.

g. Petitioner did not raise below any state law teaching contract violation claim, including whether his termination was or was not "for cause."

h. Petitioner did not raise any issue regarding real or alleged conflicts between federal and state law in reference to the Veterans Reemployment Rights Act below.

i. Petitioner did not raise any issue regarding the any alleged conflict between pursuing his veteran

reemployment rights and a social security disability claim.

B. THE COURTS BELOW PROPERLY GRANTED AND UPHELD THE DISMISSAL OF ALL CLAIMS ASSERTED AGAINST THE KENTUCKY TEACHERS' RETIREMENT SYSTEM.

Petitioner's claim for disability benefits from KTRS arose in June, 1983, when Mr. Jordan completed his fifth year of teaching service. As correctly determined by the courts below, Petitioner's entitlement to a disability pension from KTRS is to be evaluated under the law as it existed when he first became eligible for his pension. This statute, K.R.S. 161.661(1), read as follows:

> Any member who has completed five (5) or more years of accredited service in the public schools of Kentucky after July 1, 1941, may retire for disability and be granted a disability allowance if found to be eligible as provided below. Application for disability benefits must be made within one (1) year of the last contributing service in Kentucky, and the disability must have occurred during the most recent period of employment in a position covered by the teachers' retirement system and subsequent to the completion of five (5) years of teaching service in Kentucky.

In applying the four factors enumerated in the statue to the facts of Petitioner's case, the courts below correctly determined that Mr. Jordan was not eligible for a disability pension from KTRS. In granting Respondent KTRS' motion to dismiss, the courts below determined that Petitioner, after completing five years of accredited service, applied too late for his pension. This delay in and of itself precludes Petitioner from receiving a disability pension under applicable state law.

Additionally, while not considered by the courts below, the record shows that Petitioner's claimed disability did not occur

during his most recent period of employment in a Kentucky public school; and his claimed disability occurred prior to his completion of five years of accredited service. Both of these factors, standing alone, would also have been sufficient to support KTRS' denial of Petitioner's disability pension.

Petitioner Jordan was afforded all rights and benefits under the KTRS disability retirement in effect at the time when his right to a pension accrued. Applicable federal law, not relied upon by the courts below in granting Respondent KTRS' motion to dismiss, did not grant Petitioner any greater disability pension rights than those which existed under applicable state law. Petitioner's is not entitled to a writ of certiorari in this case.

C. THE COURTS BELOW PROPERLY GRANTED AND UPHELD THE SUMMARY JUDGMENT GRANTED TO KENTON COUNTY BOARD OF EDUCATION ON ALL CLAIMS ASSERTED AGAINST IT.

Petitioner Jordan argues that this Court should grant his petition for certiorari as to the summary judgment entered against him on the grounds that he was denied the opportunity to conduct discovery while his claim was pending in district court. In order to prevail on this argument, however, Petitioner is required to show that he informed the trial court, either by affidavit or motion, that he needed to conduct discovery before it ruled on the then pending dispositive motion. See, Vance by and through Hammons v. U.S., 90 F.3d 1145, 1149 (6th Cir. 1996). The record below is devoid of any evidence that Petitioner informed the district court that he needed additional discovery in order to properly oppose Respondent's motion.

Petitioner first filed suit on November 3, 1994. Respondent Kenton County Board of Education filed a motion to dismiss Petitioner's claim against it on January 17, 1995. Respondent attached to its memorandum in support of its motion the findings of the U.S. Department of Education, Office of Civil Rights, regarding its investigation into Petitioner's civil rights complaint against the Board. On May 26, 1995, Petitioner filed an amended complaint against Respondents herein, restating his same claims. On June 19, 1995, Respondent Board of Education filed a motion to dismiss the amended complaint, attaching both the Office of Civil Rights Report and an affidavit in support of the motion signed by then superintendent of the school system, Neil Stiegelmeyer. Respondent Board of Education relied, in part, on the doctrine of laches in seeking the dismissal of Petitioner's complaint.

On August 7, 1995, nine months after filing suit, and prior to submitting any discovery requests to Respondent, Petitioner filed a response to the school board's motion to dismiss. In the body of his response, Petitioner baldly alleges that discovery would enable him to uncover evidence of wrongdoing by the Board, but does not ask the court for any time in which to conduct this discovery. Additionally, Petitioner did not file an affidavit in support of his claimed need for discovery, nor did he file any motion with the court seeking time to obtain discovery from Respondent. Thus, even acknowledging the Court's solicitousness of pro se litigants, Petitioner's failure to seek discovery in the trial court precludes his reliance on this argument as grounds for this Court granting

his petition for certiorari.

Petitioner's failure to either seek discovery during the nine months his suit was pending before filing his response to the Board's motions to dismiss or ask the court for time to conduct discovery is fatal to his claim that the summary judgment motion was improvidently granted. Petitioner's failure to pursue any of the discovery avenues available to him left the court of appeals with no recourse but to uphold the district court's decision. Vance, 90 F.3d at 1149.

Furthermore, in light of Respondent's reliance on the doctrine of laches in seeking dismissal of Petitioner's complaint against it, discovery of documents or other information alleged to be in the possession of Respondent would not have assisted Petitioner in withstanding the pending motion. If evidence existed to explain Petitioner's lengthy delay in bringing his suit, as well as his failure to seek any discovery, presumably it was in his possession. Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190, 1196 (6th Cir. 1995). Thus, even if Petitioner had been granted an additional opportunity to conduct discovery of Respondent Board, the information he obtained likely would not have affected the district court's decision to grant Respondent's motion on the basis of laches. Petitioner's reliance on the lack of discovery in this case constitutes a problem of his own making and provides no basis for this Court to grant his motion for certiorari.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari filed by Albert Jordan should be denied.

Respectfully submitted,

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CERTIFICATION

I hereby certify that I have, this 3 day of January, 1997, mailed a copy of the foregoing pleading to:

Albert Jordan
5855 South Herringer Road
Alexandria, Kentucky 41001

DONALD J. RUBERG
O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT

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